



Comptroller General
of the United States

Washington, D.C. 20548

14591223

Decision

Matter of: ERI Environmental Services, Inc.

File: B-246169

Date: February 18, 1992

Nancy O. Dix, Esq., and Ted D. Billbe, Esq., Gray, Cary, Ames & Frye, for the protester.

Lester Edelman, Esq., Department of the Army, for the agency.

Robert C. Arsenoff, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Record does not support protester's contention that it was misled by agency's oral advice to submit a best and final offer that did not conform to the solicitation's bonding requirements with the understanding a failure to conform to those requirements would, in effect, be waived.

2. Allegations that solicitation terms related to bonding requirements overstated the agency's minimum needs and were restrictive of competition are dismissed as untimely since they were filed after the date set for receipt of initial proposals.

DECISION

ERI Environmental Services, Inc. protests the rejection of its offer for lack of a sufficient proposal bond under request for proposals (RFP) No. DACA05-91-R-0062, issued by the Army Corps of Engineers for a soil remediation project, to be conducted in three basic phases to clean up approximately 15,500 cubic yards of contaminated soil in oxidation lagoons at the Sacramento, California, Army Depot. While ERI does not dispute that it submitted a bond in an insufficient amount, the protester asserts that it was misled into submitting a best and final offer (BAFO) as the result of oral advice from Army contracting officials. ERI also argues that the solicitation overstated the agency's needs for bonding protection in light of a "negative option" provision which gave the government the right to delete successive phases of the project.

We deny the protest in part and dismiss it in part.

The RFP was issued on July 2, 1991, and contained a requirement to submit a proposal bond in the amount of 20 percent of the contract price or \$3,000,000, whichever is less. The solicitation required offerors to submit fixed line item prices for three basic phases of the project at the Sacramento Depot--a pilot soil washing test to determine the validity of the soil washing system, the design of a soil washing system, and implementation of the design--together with an option for cleaning up an additional 2000 cubic yards of soil. Amendment No. 4 was issued on August 9 and extended the date for receipt of initial offers to August 20. It also added another option item requiring offerors to submit "negative" prices indicating the amount of compensation they would receive in lieu of a standard termination for convenience settlement if, after a review of the pilot test and the initial design phases of the project, the agency decided not to continue with the other phases.

Two offers were received by August 20. In its offer, ERI stated that it was unable to secure a proposal bond in an amount sufficient to cover all three phases of the project because of its status as a small disadvantaged business (SDB). Written discussions commenced with both offerors by letters dated September 3. ERI was specifically advised in the September 3 letter that there was no provision for waiving the bonding requirement for the entire scope of the project as the result of its SDB status. On September 4, ERI again advised the contracting specialist that it was having difficulty obtaining a sufficient bond and requested assistance in identifying "alternative mechanisms for bonding government work of this magnitude." On September 5, the contracting specialist referred the firm to the Surety Association of America and the Small Business Administration for assistance.

ERI submitted a revised offer on September 9 which still contained an insufficient bond. The firm reiterated that it was unable to obtain a bond to cover all phases of the project but stated that it would submit "a fixed-price and bid bond for full scale remediation upon completion of the pilot study"--in essence an alternative proposal to phase the bonding requirements.

During the month of September 1991, the record shows that representatives of ERI and the chairman of the agency's source selection board and its contracting specialist had a number of telephone discussions regarding the protester's reported lack of success in obtaining bonding to cover all three basic phases of the project and its proposal to phase the bonding requirements.

By letter dated September 19, both offerors were advised that their technical proposals were acceptable. They were requested to submit BAFOs by September 25, together with new bonds sufficient to reflect any changes in the cost proposals. There were no changes made in the RFP's bond requirements. On September 30, ERI's proposal was rejected for lack of a proposal bond sufficient to cover all phases of the project and award was made to the only other, and higher-priced, offeror--U.S. Pollution Control, Inc. This protest followed on October 9.

ERI's protest contains two principal contentions. First, ERI maintains that the agency acted improperly in orally advising the firm during several September telephone conversations that the agency was exploring alternatives to the requirement for bonding all phases of the project and that the firm's bonding problems "could be worked out." In this regard, ERI argues that it was misled into submitting a BAFO. The protester requests, among other things, that its BAFO be evaluated "without regard to the requirement for a [proposal] bond in the combined amount of all program phases." According to the protester the result of the agency's actions was not a real competition but a de facto sole-source for U.S. Pollution Control.

In a second--but related--contention, the protester argues that the Army overstated its minimum needs for bonding protection by requiring proposal bonds to cover all three phases of the project while also including a "negative option" which permitted the government to delete successive phases of the project after completion of the pilot study. The protester also questions whether the Army had the authority to require proposal bonds at all and whether the agency could properly include a negative option provision. ERI concludes that this "unusual contract structure" unnecessarily limited competition without a corresponding benefit to the agency.

With respect to ERI's first contention, that it was misled into submitting a BAFO by oral advice from agency officials, the Army states that the protester was informed that there was "no guarantee" that the full bonding requirement would be waived and further states that ERI was advised that it would operate at its own risk in submitting a BAFO with less than sufficient bonding. With respect to ERI's second contention, the Army argues that the protest is untimely because it is based on alleged improprieties in the RFP which were apparent prior to August 20--the date set for receipt of initial proposals--and, therefore, had to be filed by that time. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1991), as amended by 56 Fed. Reg. 3759 (1991).

In our view, the record does not show that ERI reasonably relied on oral advice from Army officials in submitting a BAFO which failed to include a bond in the full amount required by the RFP's terms. The sworn statements from both parties disclose, at best, that some indication was given to ERI to the effect that its bonding problems could be "worked out" and that, at one point, its proposed "phasing" of the bond requirement was "under consideration." The statements also indicate, however, that ERI was orally advised on at least two occasions that there was no guarantee that less-than-full bonding would be acceptable and that, if it submitted a BAFO without full bonding, it was doing so at its own risk. Nothing in the protester's version of events contradicts these last two statements, and after reviewing the entire record we have no basis for concluding that the protester was improperly misled by the agency's advice.


The bonding requirements in the solicitation were never amended and where, as here, a solicitation expressly cautions offerors against relying upon oral advice from agency personnel prior to award (see Federal Acquisition Regulation (FAR) § 52.215-14; incorporated in full in the RFP), offerors who ignore the admonition and rely upon alleged erroneous advice which conflicts with specific terms in the solicitation do so at their own risk. Such advice does not operate to amend the solicitation or otherwise legally bind the agency. See Consolidated Bell, Inc., B-228492, Feb. 19, 1988, 88-1 CPD ¶ 169. Therefore, we deny the portion of ERI's protest based upon the ground that the agency allegedly misled the protester into continuing in the competition.

Also, we do not agree with the protester that the procurement was a de facto sole-source because there is nothing in the record which shows that, at the time the solicitation was issued, there was no reasonable expectation of obtaining competition. We believe that at the time BAFOs were submitted, the agency reasonably expected that ERI, which could obtain a \$1 million bond, might be able to provide a proposal bond which at least covered the difference between the prices of the two proposals. See FAR § 28.101-4(c)(2); cf. Sun Refining and Mktg. Co.; Barrett Refining Corp., B-239973; B-239973.2, Oct. 17, 1990, 90-2 CPD ¶ 305.

As to the protester's contention that the terms of the solicitation overstated the agency's needs and were otherwise improper and restrictive of competition, ERI argues that it timely raised these matters in its October 9 protest since it could not have known how the disputed terms would be interpreted until it received its rejection letter on October 1 following oral advice to the effect that alternative bonding arrangements were being considered. If ERI thought that the solicitation was defective, it was

incumbent upon the firm to file a protest prior to the August 20 closing date. 4 C.F.R. § 21.2(a)(1), supra. The firm is not excused from its obligation to file a timely protest as the result of alleged oral advice given during the procurement process in the face of the fact that the agency did not change any of the RFP terms to which the firm objected by the time BAFOs were due. See American Training Aids, Inc., B-232291, Dec. 19, 1988, 88-1 CPD ¶ 600. We therefore dismiss this aspect of the protest.

The protest is denied in part and dismissed in part.


for James F. Hinchman
General Counsel